Date: May 20, 1998

Case No.: 96-INA-00479

In the Matter of:

ART RESOURCE,
Employer

On Behalf Of:

GERHARD GRUITROOY,
Alien

Appearance: Michael J. Prior, Esq.
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 18, 1994, Art Resource ("Employer") filed an application for labor certification to enable Gerhard Gruitrooy ("Alien") to fill the position of Director of Research (AF 10). The job duties for the position are:

> Utilizing knowledge of Art History, supervise the maintenance, storage and cataloguing of fine art photographs of works of painting, sculpture, architecture and the minor arts for photo archive. Research and analyze photo images by subject, title, artist, period, place and medium to establish a detailed cross-reference subject and thematic listing systems. Research scholarly works and historical documents on Art History, to assure accuracy of photo image catalogue. Advise staff on proper historical classification of new acquisitions. Manage staff of four photo archive researchers.

The requirements for the position are a Ph.D. in Art History, and one year of experience in the job offered or one year of experience in the related occupation of Photo Archive Researcher. Other Special Requirements are, "[k]nowledge of French, Italian and German."

The CO issued a Notice of Findings on March 5, 1996 (AF 153-157), proposing to deny certification on the grounds that the Employer's requirement of "[k]nowledge of French, Italian and German" is unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2). The CO notified the Employer that it must either delete the requirement and readvertise or document the business necessity of the requirement. The CO also found that the Employer did not list the actual minimum requirements for the position as the Alien does not appear to have had ability in these languages prior to being hired in violation of § 656.21(b)(5). The CO notified the Employer that it must document that it is not feasible to train someone who does not possess the language requirements, or show that the Alien was qualified prior to being hired. The CO additionally

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

found that the Employer rejected and failed to recruit in good faith three U.S. applicants, Toby Yuen, Sarah E. Lawrence, and Ann Milstein Guite, in violation of §§ 656.24(b)(2)(ii), 656.21(b)(7), and 656.20(c)(8). The CO notified the Employer that it must document that these U.S. applicants were recruited in good faith and rejected for lawful, job-related reasons.

In its rebuttal dated April 9, 1996 (AF 158-74), the Employer submitted an Affidavit from Dr. Theodore Feder which contended that Ms. Yuen was rejected for only having a "reading knowledge" of French and German, and that the Alien "had extensive knowledge of German, French and Italian, including the ability to speak, read and write all three of these languages." The Employer also submitted an Affidavit from the Alien stating that he is fluent in English, German, Italian, and French, is a German national, lived and taught in Italy, and studied in, and traveled regularly to France (AF 163-64). Employer also submitted an Affidavit from Joanne Greenbaum who stated she interviewed Mrs. Lawrence and was "unable to substantiate her knowledge of French," and "her knowledge of German was very basic and required that she extensively use a dictionary." Ms. Greenbaum also interviewed Mrs. Milstein Guite, who "indicated that she reads Italian and French but could only read German with extensive use of a dictionary." She further stated "[s]ince it is necessary for the Director of Research to make quick decisions based on the knowledge of all three foreign languages, I did not feel that either Mrs. Guite or Mrs. Lawrence fulfilled the requirements needed by Art Resource, Inc." (AF 160).

The CO issued the Final Determination on May 1, 1996 (AF 175-77), denying certification because Employer failed to document good-faith recruitment and lawful, job-related reasons for rejecting three U.S. applicants in violation of §§ 656.24(b)(2)(ii), 656.21(b)(7), and 656.20(c)(8).

On June 7, 1996, the Employer requested review of the denial of labor certification (AF 178-83). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.20(b)(7). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Section 656.21(b)(7) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 87-INA-161 (Dec. 7, 1988) (*en banc*). Section 656.24(b)(2)(ii) states, in relevant part, that the CO shall consider a U.S. worker able and qualified for the

job opportunity if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other workers similarly employed. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

In this case, the Employer's application required a Ph.D. in Art History, one year of experience in the job offered or as a Photo Archive Researcher, and knowledge of French, Italian, and German (AF 10). All three U.S. applicants in question were rejected by the Employer solely for having what the Employer considered insufficient knowledge of the languages, even though their resumes show some degree of fluency with all three languages. In the NOF, the CO required the Employer to define its language requirements, document its contact and interviews with the applicants, as well as lawful reasons for their rejection (AF 155-56). In rebuttal, the Employer stated that the position requires more than "a bare reading knowledge" of the languages, requires the individual to "quickly make decisions based on written and verbal information in those languages," and to "engage in phone calls to, and to attend meetings with our European agents, as well as to prepare and supervise photographic campaigns abroad" (AF 167).

In the Final Determination, the CO found that the Employer had not documented in detail how the language deficiencies were determined during the interview, what exactly the Employer requires, and what is needed to substantiate the language skills of the applicants (AF 175). We agree. In general, an applicant is considered qualified for a job if he meets the minimum require-ments. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991). Here, Employer never adequately documents or defines what is needed for a qualified applicant regarding the languages. Accord-ingly, it has not shown that Ms. Yuen, Mrs. Guite, and Mrs. Lawrence are not qualified and could not perform the main job duties. See *Quality Inn*, 89-INA-273 (May 23, 1990); *The Weck Corp. d/b/a Gracious Homes*, 93-INA-35 (Mar. 8, 1995). Nor has the Employer shown that they could not perform the duties of the position with a nominal period of on-the-job training. See *Mindcraft Software, Inc.*, 90-INA-328 (Oct. 2, 1991); *St. George's Medical Center*, 95-INA-111 (Jan. 29, 1997). Although the Alien may be more suited to the Employer's requirements, an employer may not reject U.S. applicants because the Alien is more qualified. *K Super KQ 1540-A.M.*, 88-INA-397 (Apr. 3, 1989) (*en banc*); *V.I. Water and Power Auth.*, 93-INA-322 (Oct. 11, 1994).

We also agree with the CO that it appears as though the Employer is using its subjective determination of "[k]nowledge of French, Italian, and German" to favor the Alien. Ms. Yuen wrote in response to a Department of Labor questionnaire that the Employer's response was "truly puzzling, since he never inquired about my French or German skills during that interview" (AF 155). Moreover, in rebuttal, the Employer requires the additional duties of to "quickly make decisions based on written and verbal information in those languages," and to "engage in phone calls to, and to attend meetings with our European agents, as well as to prepare and supervise photographic campaigns abroad," which are not listed on the application. An employer may not belatedly seek to add even more restrictive requirements and use them as a basis for rejecting a U.S. worker. *Industrial Refrigeration, Inc.*, 93-INA-206 (July 6, 1994); *Metal Cutting Corp.*, 89-INA-90 (Jan. 8, 1990).

Based on the foregoing, we find that the Employer has failed to adequately document that three U.S. applicants were rejected for lawful, job-related reasons in violation of §§ 656.24(b) (2)(ii), 656.21(b)(7), and 656.20(c)(8). The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.